HO WENG KONG

v.

MANN FOONG REALTY SDN BHD & ANOR

HIGH COURT MALAYA, IPOH
ABDUL HAMID EMBONG J
[CIVIL SUIT NOS: 22-155-1996 & 22-146-1996]
4 MAY 2000

CIVIL PROCEDURE: *Want of prosecution - Striking out action for want of prosecution - Delay over a year from close of pleadings to filing of summons for direction - Whether reasonable for plaintiff to await outcome of pending appeal - Whether fact that solicitor left firm and plaintiff could not be contacted acceptable excuses - Test applied - Whether defendant still needed to show prejudice - Whether an abuse of process*

The plaintiff, in this consolidated action, was guilty of delay of over a year in seeking for summons for direction. The plaintiff applied to the assistant registrar for extension of time to file the summons for direction. The reasons given for the delay were that: (i) the lead action was still pending; (ii) the plaintiff could not be contacted; (iii) the solicitor representing the plaintiff had since left the firm; and (iv) there was a pending appeal.

The assistant registrar refused the plaintiff's application for extension of time to file the summons for direction and allowed the 2nd defendant's application to strike out the plaintiff's writ of summons with costs for want of prosecution under O. 25 of the Rules of the High Court 1980 ('RHC'). Hence, the instant appeal.

Held:

[1] In an application to strike out a writ, the court was traditionally guided by two-pronged principles stated by the House of Lords in *Birkett v. James,* that the action would be dismissed if the court is satisfied that: (i) the plaintiff's default has been intentional and contumelious; or (ii) the plaintiff or his lawyer has been guilty of such an inordinate and inexcusable delay that the defendant had been prejudiced by it.

[1a] The court need not now satisfy itself whether the defendant was prejudiced by the inaction of the plaintiff where the plaintiff was found to be blameworthy for the delay in total disregard of the rules in the RHC. That by itself, tantamounts to an abuse of process upon which this court might now act to dismiss the plaintiff's claim.

[2] The fact that the solicitor who was representing the plaintiff, had left the firm and that the plaintiff could not be contacted were too lame for this court to accept as excusable. The firm was not a one-man show and the plaintiff himself should be vigilant. He could not be excused because of an idle solicitor.

[3] Order 25 r. 1 of the RHC clearly states that a plaintiff must take out the summons required within the time frame provided. Therefore, it is a mandatory requirement which requires strict compliance and meticulous obedience. If flouted, it cannot be regarded as an irregularity that could be saved under O. 2 of the RHC.

[Appeals dismissed; plaintiff's writs in both suits accordingly dismissed.]

Case(s) referred to:
Alloy Automative Sdn Bhd v. Enkei Automative Co Ltd [1997] 2 CLJ 392 ***(refd)***
Birkett v. James [1977] 3 WLR 38 ***(refd)***
Chrishty Coveney & Co v. Raja (Times Law Report, 29 December 1997, 698) ***(refd)***
Feng Hua Development Sdn. Bhd. v. Asia Commercial Finance (M) Bhd [1999] 4 MLJ 295 ***(refd)***
Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 ***(refd)***
RR Austral Amalgamated Bhd & Ors [1998] 4 AMR 3755 ***(refd)***
TM Feroze Khan v. Meera Hussain [1999] 4 CLJ 373 ***(refd)***
Trustees Of Leong San Tong Khoo Kongsi (Penang) Registered v. Lee Boon Tin [1998] 4 CLJ 368 ***(refd)***
Toh Hock Thye & Ors v. Toh Chwee Biow [1982] 1 MLJ 152 ***(refd)***
Vasudevan v. T Damodaran & Anor [1982] 2 MLJ 150 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 2, O. 18 r. 19(1), O. 25 r. 1(2), (4), O. 34

For the plaintiff - Segaran (Rajan with him); M/s Maxwell, Kenion, Cowdy & Jones
For the 2nd defendant - Hira Singh (Anit Kaur with him); M/s Asbir Hira Singh & Co

Reported by AG Kalidas

JUDGMENT

Abdul Hamid Embong J:

Six appeals against the decision of the learned timbalan pendaftar (TP) were heard together. These appeals are found in the following enclosures in GS22-155-96 (with corresponding appeals in GS22-146-96, in brackets).

In GS. 22-155-96

1. Encl 43 (encl. 50 in GS.22-146-96) – An appeal by Dial Kaur (D2) against TP's decision allowing the plaintiff to file his affidavit in reply out of time.

2. Encl. 45 (encl. 52 in GS.22-146-96) – Appeal by the plaintiff against TP's decision in refusing the plaintiff an extension of time to file its summons for directions.

3. Encl. 46 (encl. 53 in GS.22-146-96) – Appeal by the plaintiff against TP's decision allowing D2' application to strike out with costs the plaintiff's writ for want of prosecution pursuant to O. 25 Rules of High Court 1980 (RHC).

The appeals were argued together before me and the parties agreed that the court heard the appeals filed in GS22-155-96 and the decision be binding on the corresponding appeals in GS22-146-1996. On 9 March 2000 after hearing submissions in respect of all the appeals this court had dismissed with costs all the appeals and confirmed the decisions of the learned TP.

Background

D2 is a landowner who had entered into a joint venture agreement with D1 (Mann Foong Realty SB) to build shophouses on her land. A power of attorney was given by D2 to D1. The plaintiffs in both these suits before me are purchasers of two of the shophouses who are seeking to be registered as the legal owners and damages for late delivery of the shophouses. Besides these two suits, there are a number of other actions pending in other courts against the same two defendants in these suits. The lead action to all these pending suit is GS22-137-96 in which D2 is the plaintiff and D1 is the defendant. In that lead action D2 had sought for specific performance against D2, the landowner, to execute eight land titles on the shophouses in favour of D1, as the developer.

D2 had applied for and obtained an order, for these two instant suits be either heard together or immediately after determination of the lead action (see order dated 29 October 1996 at encl. 21 in GS 22-155-96). It was also agreed that these two suits would stand or fall with the lead action in that the latter would determine whether or not there was any binding agreement between both defendants (D1 and D2) in these suits, and if there was none, then the basis of these two suits would collapse and there would then be no case to proceed against D2.

These was no dispute that the plaintiff in both these suits before me had been guilty of inordinate delay in seeking for a summons for directions in respect

of both suits. The plaintiff had applied for a time extension on 17 September 1998 (encl 39), to file his summons for directions, a day after the unsealed copy of D2's application to strike out their writ of summons (see Encl 33). The pleadings in this action were deemed closed on 13 November 1996 and pursuant to O. 25 r. 1(2) RHC, the plaintiff was duly bound to take out a summons for directions, within one month. The delay was therefore over a year. In the interim, D2 had applied to strike out the plaintiff's pleadings under O. 18 r. 19(1) RHC which was dismissed by this court on 22 April 1997. Now, even if that date was taken to be as the date when the statutory time began to run, the delay, up to 17 September 1998 would still be over a year, and still excessive. The plaintiff had sought to explain the delay in the affidavit of his solicitor, (encl. 38) stating that since the lead action (GS 22-137-96) was still pending, he had believed that this suit should be stayed. The solicitor also deposed that he had not been able to contact the plaintiff and that he (the solicitor) had since left the firm acting for the plaintiff, thus contributing to the delay. Further, in submission, learned counsel referring to the impugned affidavit of plaintiff's (encl. 41, which I had allowed to be read in support of plaintiff's application for extension of time), said that since there was a consolidation of this case and the lead action, D2 was fully aware of the status of this suit and had abused the court's process in now applying to strike out the writ. Also, it was argued that there is now a pending appeal in respect of D2's application to strike out the plaintiff's pleading under O. 18 r. 19 RHC. D2 should therefore be in no haste to strike out the suit now. Learned counsel cited *Feng Hua Development Sdn. Bhd. v. Asia Commercial Finance (M) Bhd* [1999] 4 MLJ 295, and *TM Feroze Khan v. Meera Hussain* [1999] 4 CLJ 373; [2000] 1 MLJ 321, in support of his contention that the plaintiff was waiting for the outcome of the appeal by D2, the plaintiff should therefore not be faulted for his delay in taking out the summons for directions.

In considering an application to strike out a writ, the court has traditionally approached the matter by following the two-pronged guiding principles stated by the House of Lords in *Birkett v. James* [1977] 3 WLR 38, that the action would be dismissed if the court is satisfied that –

(1) the plaintiff's default has been intentional and contumelious, or

(2) the plaintiff or his lawyer has been guilty of such an inordinate and inexcusable delay that the defendant had been prejudiced by it.

Toh Hock Thye & Ors v. Toh Chwee Biow [1982] 1 MLJ 152 and *Vasudevan v. T Damodaran & Anor* [1982] 2 MLJ 150 are two local authorities usually cited as accepting those principles.

In this case, that the plaintiff was clearly guilty of inordinate delay remains undisputed. Whether there was any excuse for that delay can be discerned from the affidavits of both the solicitor (encl. 38) and the plaintiff's (encl. 41) and determined by this court according to the explanation forwarded and the surrounding circumstances forming the antecedents of this application.

That the solicitor had left the firm representing the plaintiff and that the plaintiff could not be contacted (plaintiff said he was overseas at the relevant period) must surely be too lame for this court to accept as excusable. The firm is not a one-man show. The plaintiff himself should be vigilant and cannot be excused because of an idle solicitor (see *Alloy Automative Sdn Bhd v. Enkei Automative Co Ltd* [1997] 2 CLJ 392; [1997] 3 MLJ 205. Should the plaintiff adopt a 'wait and see' attitude, in view of the consolidation order and the pending interlocutory appeal, and so need not move under O. 25, to obtain a summons for directions? In my view, the plaintiff could not do so. Order 25 r. 1 RHC clearly states that a plaintiff **must** take out the summons required within the time frame provided. It is therefore a mandatory requirement (see *RR Austral Amalgamated Bhd & Ors* [1998] 4 AMR 3755). This procedure, couched in such a peremptory language, is one requiring strict compliance and meticulous obedience, and if flouted, cannot be regarded as an irregularity that could be saved under O. 2 RHC. In any event, it is not right for a litigant to assume that the court is obliged, in every case, to overlook the breach of its rules. As the Federal Court said in *Lai Yoke Ngan & Anor v. Chin Teck Kwee @ Chin Teck Kwi & Anor* [1997] 3 CLJ 305 at p. 319 –

> For that would mean that a litigant may honour the Rules of the High Court more by breach rather than by observance. This is certainly not the law.

Next, to consider the submission by learned counsel of the plaintiff that it had not been shown that D2 had suffered any prejudice by the delay. For this contention, this court will rely on the recent Court of Appeal decision in *Trustees Of Leong San Tong Khoo Kongsi (Penang) Registered v. Lee Boon Tin* [1998] 4 CLJ 368; [1998] 4 MLJ 373, where the guidelines of *Birkett v. James* were thoroughly discussed and reference made to two English decisions dealing with case flow management on the need to strictly observe rules providing for time limits. In the first of those English authorities, in *Arbuthnot Latham Bank Ltd v. Trafalgar Holdings Ltd & Ors* and *Chrishty Coveney & Co v. Raja* (Times Law Report, 29 December 1997, 698), Lord Woolf MR made the following remarks –

> In *Birkett v. James*, the consequence of inordinate delay was not a consideration which was in issue. From now on it was going to be a consideration of increasing significance.

> Litigants and their legal advisers had therefore to recognize that in the future any delay which occurred would be assessed not only from the point of view of the prejudice caused to the particular litigants whose case it was, but also in relation to other litigants and the prejudice which was caused to the due administration of justice.
>
> The existing rules contained time limits which were designed to achieve the disposal of litigation within a reasonable time scale. Those rules should be observed.

In our Court of Appeal, Mokhtar Sidin, JCA applied the abovestated principle and recognised the birth of a new limb as a ground for striking out a plaintiff's claim by stating –

> This new limb as we understood it to be from the two cases in that where there is inordinate and inexcusable delay which involves complete, total or wholesale disregard of the rules of the court with full awareness of the consequences is capable of amounting to such an abuse so that if it is fair to do so, the action will be struck out or dismissed on that ground. From the decisions too, it appears to us that there is no necessity to show prejudice in such cases.

His Lordship also remarked –

> The respondent was prompted by the court and the appellants to proceed to the next step. It is clear to us that the delay was caused by the inaction of the respondent and his solicitors to pursue this case. The respondent and his solicitors appeared to be sleeping until they were awakened by the court by the notice to show cause. We had gone through the affidavit filed by the respondent and there was no explanation for the delay.

Although the case of *Trustees of Leong San Tong Khoo Kongsi (Penang)* dealt with an application for striking out for want of prosecution under O. 34 RHC, the considerations given there are similarly applicable to this case. I am of the view therefore, that this court under this new additional limb, need not now satisfy itself whether D2 had shown that she had been prejudiced by the inaction of the plaintiff in a situation, as here, where the plaintiff is found to be blameworthy of delay in total disregard of the rules in the RHC, which by itself, tantamounts to an abuse of process upon which this court may now act to dismiss the plaintiff's claim. Taking all the facts and circumstances of this case, my finding is that the plaintiff had been reprehensibly idle and was guilty of inordinate and inexcusable delay. No acceptable explanation for that delay was shown, nor had the plaintiff shown that his inordinate delay had not prejudiced the "due administration of justice" to borrow the warning expressed by Lord Woolf MR (above). Further, the plaintiff was found to have moved only after D2 had jolted him with this application to strike out his writ, an act which cannot now be condoned.

After my decision on 9 March 2000 to dismiss all these appeals, learned counsel for D2 furnished a copy of the decision of the Court of Appeal in respect of the lead action *viz* GS 22-137-96. In that case, D2 had appealed to the Court of Appeal against the decision of the High Court dismissing D2's application to strike out the plaintiff's action under O. 25 r. 1(4) RHC (similar to D2's application in encl. 46 in this case). In that lead action the plaintiff had not taken out summons for directions until 53 days after the pleadings were deemed closed. As in the instant case before me, D2, had filed an application to strike out the plaintiff's action which moved the plaintiff to file for summons for directions.

The learned deputy registrar allowed the plaintiff's application, which was affirmed by the judge in chambers.

On appeal, the Court of Appeal (see Rayuan-Rayuan Sivil No. A-02-28-1977, A-03-45-1997, and A-03-54-1997, heard together) allowed D2's appeal, and dismissed the plaintiff's action and stated as follows –

> As explained in the earlier appeal, the defendant's application to dismiss the action was made under O. 25 r. 1(4) after the plaintiff had failed to take out a summons for directions within time. It should have been heard and an order made on it under O. 25 r. 1(5). It should not have been dismissed in preference to making an order under the plaintiff's summons for directions which was not taken out within time. The appeal must therefore be allowed. However, in allowing the appeal by the defendant, we have to act under rule 1(5) since the courts below did not do so. Paragraph 5 of rule 1 on Order 25 of the RHC enables the court when considering the defendant's application to dismiss under paragraph (4) either to dismiss the action on such terms as may be just or to deal with the application as if it were a summons for directions. In our judgment, as the plaintiff's action is quite unsustainable (see the first appeal above), it is futile and a waste of time to deal with the defendant's application as a summons for directions instead of dismissing the action. In the event, we are of the opinion that it is more appropriate, in the circumstances of the present case, to dismiss the action. This we did under rule 1(5).

Seemingly, for now, the lead action is sunk.

For the reasons stated above, these appeals are dismissed with costs. The plaintiff's writs in respect of both suits are accordingly dismissed with costs.